

## Public Law Coursework

### Question 1

The facts of the case study revolve around the decision-making processes of the Solar Panels Commission (hereinafter “*the SPC*”) in the execution of its core mandates as set out in the Solar Panel (Standards) Act 2019 (hereinafter “*the SP Act*”). By virtue of the SPC being a public body, its decision can be challenged through judicial review proceedings. Fundamentally, judicial review is a facet of constitutional law that allows the citizenry to challenge the decisions or the exercise of power by public authorities.<sup>1</sup> In this regard, judicial review cushions the populace against decisions of public bodies that are illegal, irrational, procedurally improper or contravening the provisions of the Human Rights Act 1998.<sup>2</sup> In the immediate scenario, Consumer Protect (hereinafter “*CP*”) and Universal Panels (hereinafter “*UP*”) have been aggrieved by the respective decisions of the SPC and intend to challenge them. However, their desire to challenge the said decisions by the SPC is faced by one major stumbling block as the provisions of the SP Act impose an ouster clause by providing that decisions of the SPC are final and no appeal can lie against it. On account of the foregoing, the analysis hereinafter seeks to examine whether UP and CP can apply for judicial review, notwithstanding the ouster clause in the SP Act. Further and arising from the preceding issue, the analysis will examine the grounds and remedies available to UP and CP in their judicial review pursuit.

#### **Whether UP and CP can Apply for Judicial Review in Light of the SP Act Ouster Clause**

Principally, in the United Kingdom, judicial review seeks to remedy the decisions of public bodies. Therefore, in determining whether UP and CP can apply for judicial review, it is imperative to demonstrate that SPC is a public authority. In *R v Panel on Take-overs and Mergers* the Court

---

<sup>1</sup> Türk, Alexander H. *Judicial review in EU law*. Edward Elgar Publishing, 2010.

<sup>2</sup> Halliday, Simon. *Judicial review and compliance with administrative law*. Hart Publishing, 2004.

held that an authority is public as long as its functions are public in nature.<sup>3</sup> In the immediate case, the SPC was established to regulate solar panels industry in the country, a patently public function. As such, its decisions can be challenged by UP and CP through judicial review.

However, the judicial review avenue has been explicitly prohibited by an ouster clause in the SP Act by providing that the decisions of the SPC cannot be challenged in a court of law. Ordinarily, an ouster clause takes away the supervisory jurisdiction of the High Court over public bodies.<sup>4</sup> Nonetheless, Courts in the UK have held that ouster clauses in statutes are not automatic barriers to people intending to challenge the decisions of public bodies.<sup>5</sup> This position is premised on the fact that the jurisdiction of the High Court with regard to judicial review matters is inherent and cannot be limited by a statute. This position was established by the House of Lords in *Anisminic Ltd -v- Foreign Compensation Committee*.<sup>6</sup> In this case, the Foreign Compensation Act, 1950 provided that the decision of the Commission established therein would be final and would not be called into question in any court of law. The Court held that ouster clauses cannot oust the jurisdiction of courts where a decision is patently unlawful. Recently, the Supreme Court of the United Kingdom in *R (on the application of Privacy International) v Investigatory Powers Tribunal & Ors* held that a statute cannot oust the jurisdiction of the High Court to review a decision that is unlawful.<sup>7</sup> The decision of the SPC to deny UP a permit to supply solar panels in the North-West is blatantly illegitimate. In the same vein, SPC's grant of licence to PRU was improper owing to the fact that the SPC officer who oversaw the process in a shareholder in PRU.

### **Do UP and CP have the Standing to File Judicial Review Applications**

---

<sup>3</sup> [1987] QB 815

<sup>4</sup>Edlin, Douglas E. "A Constitutional Right to Judicial Review: Access to Courts and Ouster Clauses in England and the United States." *The American Journal of Comparative Law* 57, no. 1 (2009): 67-101.

<sup>5</sup> Scott, Paul F. "Ouster clauses and national security: judicial review of the investigatory powers tribunal." *Public Law* 2017, no. 3 (2017): 355-362.

<sup>6</sup> [1969] 2 AC 147

<sup>7</sup> [2019] UKSC 22

Notably, questions will be raised on whether UP and CP have the *locus standi* to bring the judicial review proceedings. The default legal position with regard to people or groups that may bring a judicial review claim is set out in Section 31 (3) of the Senior Courts Act, 1981. It provides that the Court shall not grant leave to an applicant to proceed with a judicial review application unless it is demonstrated that they have sufficient interest in the matter in question.<sup>8</sup> In this regard, UP has an undisputable standing to file a judicial review application as it has sufficient interest in the decision by virtue of having been denied a licence for supplying solar panels in the North-West. On the part of the CP, it has the *locus standi* to file judicial review proceedings in its capacity of as a pressure group. In *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement Ltd*, the Court held that pressure groups have a standing to sue in matters of public interest falling within their domains and routine activities.<sup>9</sup>

### **The Judicial Review Grounds and Remedies Available to UP and CP**

#### UP Grounds and Remedies

The SPC denied UP a permit to operate solar panel business in the North-West for the reason that it intended to preserve high standards of solar panels. Further, the SPC indicated that it had received countless complaints that solar panels were ruining the countryside views. On account of the foregoing, the SPC informed UP that it was its policy to grant only 20 permits for each region and the said limit had been reached. In support of its application for a permit, UP demonstrated that its solar panels were of high quality and the demand for solar panels in North West exceeded the supply by a vast margin. In addition, as a result of the SPC's decision, UP stands to lose several lucrative contracts.

---

<sup>8</sup> Senior Courts Act, 1981

<sup>9</sup> [1995] 1 All ER 611

The principal ground that UP should use to challenge the SPC decision is illegality. In denying UP the permit, SPC acted illegally as it abused its discretion by taking into account irrelevant considerations.<sup>10</sup> Although the SP Act grants the SPC discretion in granting permits, such discretion should be applied lawfully by taking into consideration relevant matters only. The SPC ignored the high need and demand for solar panels in the North-West when setting the 20-permits capping. Further, it ignored the evidence submitted to it by UP with regard to the quality of its solar panels as well as the high demand for solar panels in the North West. Instead, it took into account irreverent considerations, such as preserving countryside views. As such, UP's decision is illegal and fatally defective. In *R -v- Broadcasting Complaints Commission, ex parte Owen*, the Court held that a decision of a public body that is premised on irrelevant considerations is illegal.<sup>11</sup>

In terms of remedies, UP should seek an order of certiorari and damages. An order of certiorari will quash the decision of SPC and direct it to remake it taking into account relevant considerations.<sup>12</sup> In addition, an order of damages, will compensate UP for the damages suffered on account of the illegal denial of business permit.

#### CP Grounds and Remedies

On its part, CP, a pressure group is aggrieved by the decision of the SPC to grant PRU a permit to trade in East Midlands. The objection is based on the fact that PRU has previously been trading in South-East and has been supplying solar panels of poor quality, thus culminating in numerous complaints from its customers. Further, CP has learned that the SPC officer who handled

---

<sup>10</sup> Cane, Peter. "Judicial review and merits review: comparing administrative adjudication by courts and tribunals." *Comparative Administrative Law*. Cheltenham: Edward Elgar Publishing Limited (2010): 426-448.

<sup>11</sup> [1985] QB 1153

<sup>12</sup> Lax, Jeffrey R. "Certiorari and compliance in the judicial hierarchy: Discretion, reputation and the rule of four." *Journal of Theoretical Politics* 15, no. 1 (2003): 61-86.

PRU's permit application is a shareholder in PRU and has previously served as the managing director in the company.

Taking the above circumstances into account, the major ground for judicial review available to CP is procedural impropriety since PSC has blatantly breached the rule of natural justice against bias.<sup>13</sup> In *Gough v Chief Constable of the Derbyshire Constabulary*, the Court held that a decision-maker should not have any personal or pecuniary decision in the outcomes of the decision.<sup>14</sup> However, in the case of PRU, there license was approved by one of the shareholders who happens to be a decision-maker at PSC. In terms of remedies, CP will be seeking an order of certiorari quashing the permit approved by the PSC officer who is a shareholder at PRU.

## Question 2

The 1953 European Convention on Human Rights (hereinafter "*the ECHR*") is an international law instrument that protects the fundamental human rights as well as political freedoms in Europe.<sup>15</sup> Many commentators and scholars have consistently argued that Article 10 of the ECHR has remained to be one of the foundational provisions of the Convention. Fundamentally, Article 10 of ECHR provides that every person has the right to freedom of expression.<sup>16</sup> The right to freedom of expression includes freedom to hold an opinion, receive information and impart information and ideas without any form of interference by a public authority, regardless of frontiers. However, Article 10 (2) of the ECHR provides that the freedom of expression shall carry with itself duties and responsibilities and may be subjected to formalities,

---

<sup>13</sup> Velasco, Julian. "Structural bias and the need for substantive review." *Wash. ULQ* 82 (2004): 821.

<sup>14</sup> [2002] EWCA Civ 25

<sup>15</sup> Jacqu e, Jean Paul. "Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms, The." *Common Market L. Rev.* 48 (2011): 995.

<sup>16</sup> Barendt, Eric. "Freedom of expression in the United Kingdom under the Human Rights Act 1998." *Ind. LJ* 84 (2009): 851.

conditions, restrictions and penalties as may be prescribed by the law of any state. However, such laws defining the scope of freedom of expression should take into consideration, *inter alia*, the needs of a democratic society, national security interests, public safety, territorial integrity prevention of disorder or crime, protection of public health and preservation of morals. Having described the scope of the freedom of expression under Article 10 of the ECHR, the discussion hereunder examines whether any criminal liability of Dee Martin under the Shale Development (Fracking) Act 2020 (hereinafter '*the Act*') can interfere with her rights under Article 10 of ECHR and whether the government of UK would justify any such interference.

According to the facts outlined in the case study, Dee was arrested for criticizing the fracking process contrary to Section 2 of the Act. If found guilty of the offence, Dee will be convicted accordingly pursuant to the provisions of the Act. As such, the establishment of criminal liability against Dee under the Act would interfere with her rights under Article 10 of the ECHR. However, the Government of UK would be at a loss to justify any such interference. Notably, in *Handyside v United Kingdom*, the court held that "*Freedom of expression...is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population*".<sup>17</sup> Further, Article 10 of ECHR guarantees every person the right of imparting information without any interference from the public authorities.<sup>18</sup> As such, Dee actions are in tandem with Article 10 of ECHR and any interference by the UK authorities is arbitrary and illegal. Notably, Section 3(1) of the Human Rights Act 1998 provides that "*So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which*

---

<sup>17</sup> [1976] ECHR 7.

<sup>18</sup> Gearty, Conor. "Reflections on human rights and civil liberties in light of the United Kingdom's Human Rights Act 1998." *U. Rich. L. Rev.* 35 (2001): 1.

*is compatible with the Convention rights".<sup>1920</sup> As such, the provisions of Section 2 of the Act prohibiting any criticism on the fracking process is incompatible with the provisions of Article 10 of ECHR.*

## Bibliography

### **Conventions**

European Convention on Human Rights, 1953

### **Statutes**

Senior Courts Act, 1981

Human Rights Act, 1998

---

<sup>19</sup> Human Rights Act 1998

<sup>20</sup> Walker, Clive, and Russell L. Weaver. "The United Kingdom Bill of Rights 1998: the modernisation of rights in the old world." *U. Mich. JL Reform* 33 (1999): 497.

**Case Law**

Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147.

R v Panel on Take-overs and Mergers, ex parte Datafin plc [1987] QB 815.

R (on the application of Privacy International) v Investigatory Powers Tribunal and others [2019] UKSC 22.

R v Secretary of State for Foreign Affairs, ex parte World Development Movement Ltd [1995] 1 All ER 611.

Regina v Broadcasting Complaints Commissioner, Ex parte Owen [1985] QB 1153.

Gough and Smith v. Chief Constable of Derbyshire [2002] EWCA Civ 25.

Handyside v The United Kingdom [1976] ECHR 7.

**Journal Article**

Barendt, Eric. "Freedom of expression in the United Kingdom under the Human Rights Act 1998." *Ind. LJ* 84 (2009): 851.

Cane, Peter. "Judicial review and merits review: comparing administrative adjudication by courts and tribunals." *Comparative Administrative Law. Cheltenham: Edward Elgar Publishing Limited* (2010): 426-448.

Edlin, Douglas E. "A Constitutional Right to Judicial Review: Access to Courts and Ouster Clauses in England and the United States." *The American Journal of Comparative Law* 57, no. 1 (2009): 67-101.

Gearty, Conor. "Reflections on human rights and civil liberties in light of the United Kingdom's Human Rights Act 1998." *U. Rich. L. Rev.* 35 (2001): 1.

Jacqué, Jean Paul. "Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms, The." *Common Market L. Rev.* 48 (2011): 995.

Lax, Jeffrey R. "Certiorari and compliance in the judicial hierarchy: Discretion, reputation and the rule of four." *Journal of Theoretical Politics* 15, no. 1 (2003): 61-86.

Scott, Paul F. "Ouster clauses and national security: judicial review of the investigatory powers tribunal." *Public Law* 2017, no. 3 (2017): 355-362.

Velasco, Julian. "Structural bias and the need for substantive review." *Wash. ULQ* 82 (2004): 821.

Walker, Clive, and Russell L. Weaver. "The United Kingdom Bill of Rights 1998: the modernisation of rights in the old world." *U. Mich. JL Reform* 33 (1999): 497.

### **Books**

Halliday, Simon. *Judicial review and compliance with administrative law*. Hart Publishing, 2004.

Türk, Alexander H. *Judicial review in EU law*. Edward Elgar Publishing, 2010.